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Supreme Court of the United States

October Term, 1958

No. 428

ERICH W. BERENDSON,

Petitioner,

against

REDERIAKTIEBOLAGET VOLO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The memorandum opinion of the United States District Court for the Southern District of New York, dated October 26, 1956, is reported at 149 Fed. Supp. 140.

The opinion of the Court of Appeals for the Second Circuit in this case (Appendix, pp. 23-26) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 11, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. A question left open in the case of *Lauritzen* v. *Larsen*, 345 U. S. 571—whether the United States statutes

are such laws, including the provisions of the Jones Act (46 U. S. C. Sec. 688), as are available to a permanent alien resident of the United States.

2. Has the United States Court of Appeals for the Second Circuit or the United States Court of Appeals for the Fourth Circuit (which are in conflict), correctly interpreted the law which sets forth the basic facts determining whether a Federal District Court of the United States should retain or reject jurisdiction in an action by an alien seaman against a foreign shipowner.

3. Whether the theoretical, ephemeral existence of a remedy, not so in fact, is adequate support for a denial of access to our Federal Courts to alien seamen. In other words, does the mere assertion by a shipowner that a seaman has available the right to file a claim before a non-judicial foreign official, constitute the justification for an abdication by our courts of their primary duty to enforce justice between parties regardless of nationality.

4. Are seamen injured aboard vessels, not of their common nationality, obligated to have their rights adjudicated by a non-judicial agency of the common nationality of the shipowner, alien to and often hostile to the injured seaman and his nationality.

5. Is the burden of proof on a seaman to establish the hostility of the agency, selected by the shipowner, to determine the seaman's rights, or does the shipowner have the burden of establishing the fact that such agency is (1) competent; (2) available; (3) impartial, or must a seaman accept such agency regardless of how hostile, inadequate, unfair, unjust and prejudiced as such agency has been found to be. Who has the burden of proof of establishing the facts upon which jurisdiction is based, the seaman or the shipowner?

Reasons for Granting the Writ

1. The United States Supreme Court, in its decision in the case of *Lauritzen* v. *Larsen*, 345 U. S. 571, left open the question now raised in the case at bar—as to the applicability of American statutory law and its availability to a permanent alien resident of the United States.

2. The United States Court of Appeals for the Second Circuit in the case at bar has held that a district court did not abuse its discretion in rejecting jurisdiction under similar facts wherein the United States Court of Appeals for the Fourth Circuit, in *The Fletero* v. *Arias*, 206 F. 2d 267, decided as a matter of law that jurisdiction is to be retained.

3. There has been an unconscionable denial of justice to a seaman by, in fact, denying him an adequate remedy on the basis of a self serving and unproven assertion by a shipowner that such seaman could get adequate relief in a non-judicial agency of the shipowner's choice and nationality alien and foreign to the seaman. The uniform and traditional attitude of our form of Government to give to all litigants an opportunity to obtain justice in our courts has been totally disregarded and availability of our courts has been denied to these seamen, leaving them totally without any remedy in fact.

4. Common sense, reason and logic is repugnant to the suggestion that an alien seaman filing claim against a shipowner, with an agency of the shipowner's choice and nationality, alien and often hostile to the seaman, would receive the same impartial justice as he would receive in a neutral court, such as in a United States Federal Court.

5. The self serving declaration by a shipowner, without any proof and contrary to common knowledge; "that a seaman has available some remedy", should not be con-

sidered as a sound or adequate basis for denying justice to a seaman injured in international commerce on vessels trading with the United States. This is particularly so when the shipowner does not show by any affidavit or other proof that such alleged remedy is impartial, convenient or adequate for the administration of impartial justice. Common knowledge and experience have demonstrated the hostility, prejudice and injustice resulting from claims presented to such non-judicial agency and is not a fair tribunal for an alien seaman to obtain justice. The unconscionable favoritism that a shipowner would receive at the hands of an agency of its own nationality selected by said shipowner, is not conducive to an impartial administration of justice and uniformity of admiralty law. The burden of proving that such agency would mete out justice rightfully is the shipowner's burden. That the burden to prove the contrary should not be shifted to the shoulders of the seaman, who often, if not always, is in a position where legal proof of prejudice, bias and favoritism is not available to him, in spite of it being so factually.

Statement

The petitioner is a seaman, forcibly displaced through the annexation of his place of birth, Estonia, by the Soviet Government. Since that time, he has had no home other than the United States. He is a displaced person in the true sense of the word, as he has refused to return behind the Iron Curtain, having rejected a Russian passport or documentation, and he cannot obtain any other.

If the United States Courts are not open to him, he will not be able to obtain redress for his permanently crippled condition, suffered aboard a foreign flag ship under American Charter.

The District Court of the Southern District of New York rejected jurisdiction stating that he had other means of redress, to wit, a non-judicial agency of the Swedish Government.

The agency was challenged by petitioner as being biased, prejudiced and hostile to petitioner, as demonstrated by its conduct from the time of his injuries up to the time of the shipowner's motion to reject jurisdiction.

The petitioner was a seaman of Estonian birth.

He left Estonia in 1938. In 1940, the vessel on which petitioner was working was torpedoed and he was taken to England. About said time, Estonia was annexed by Russia. Berendson was directed to report to the Soviet Embassy at London to obtain a Soviet passport, as he only had an Estonian passport. This Berendson refused to do, which refusal resulted in his passport being declared invalid by the Soviet officials. Obviously, this rendered Berendson in the category of a "displaced person".

Berendson sailed on British vessels during World War II and arrived in the United States in 1946. Since 1946, Berenson obtained all his employment in the United States, signing on various vessels in various ports of the United States.

Berendson's only residence since 1946 has been the United States of America.

His residence during the entire period has been the Estonian Club in New York City until two years ago when he moved to 951 Washington Avenue, Bronx, New York. He has no relationship or national interest in Sweden by way of citizenship, residence, family, or inclination. He can not enter Sweden since his Estonian passport is not recognized by the Swedish Government. He can never return to Estonia since that country no longer exists. Thus—the United States was and is the sole forum accessible to the petitioner.

Unless the petitioner can obtain relief in the United States, he will be irretrievably shorn of his cause of action and without remedy against the shipowner for the injuries sustained.

Berendson signed aboard the M/S DALHEM, owned by the shipowner in Houston, Texas on October 20, 1952. The voyage was to terminate in a United States port.

On March 26, 1953, when working in the #4 hold, he was ordered by the Chief Mate to sweep the #3 hold. He walked along the 'tween deck, which was not provided with any light and slipped on dunnage thrown in the passage, all of which rendered the vessel unseaworthy and the shipowner guilty of negligence. Falling 20 feet to the lower deck of the #4 hold, he fractured his sacrum, his 9th and 10th dorsal vertebrae, his pelvis and sustained an injury to the groin area which hindered his waste elimination process.

At the time of the accident the ship was under charter to North Atlantic & Gulf Steamship Company, a New York corporation, with offices at 120 Wall Street, New York City.

The vessel was off the coast of Cuba. Berendson was taken off the ship and hospitalized in Havana, Cuba until June 24, 1953. During that time, he was never visited by any Swedish Consulate official nor did he receive any communication from its offices. In fact, the petitioner, when he telephoned the Consulate on June 22, was informed that the Consulate did not even know that he was hospitalized. Two days later Berendson was compelled under Cuban armed guard to rejoin the DALHEM (which had again arrived in Havana). He was unfit for duty at that time.

The vessel reached Sweden. The petitioner lived and was treated aboard the ship for the one month that it was in Swedish waters. He had discussed his Estonian passport situation with Swedish officials and was informed that the passport could not be recognized, that he could not enter the country. Learning that the ship was to return to the United States and with that understanding, Berendson re-signed for the voyage.

When the vessel reached Port Talbot, South Wales, he was informed that the ship would not touch the United

States and desiring to return here, left the ship without authorization. He was imprisoned for two months by British authorities and was then granted a six month stay.

He signed aboard the M/T Poxtos, suffered an aggravation of his injuries, signed off the vessel in the British West Indies and returned by ship to the United States on October 17, 1955.

On January 27, 1956 he filed the instant libel.

The shipowner entered its appearance and moved the Court to decline to retain jurisdiction.

On November 7, 1956, District Judge Sylvester J. Ryan caused a decree to be entered dismissing the libel, with prejudice, without any consideration to the principles of General Maritime law, in an unreported memorandum decision in which Judge Ryan held the Jones Act not applicable, with no mention of General Maritime law being or not being applicable.

A timely notice of appeal was filed on December 13, 1956. On July 11, 1958, the United States Court of Appeals for the Second Circuit, before Swan, Hincks and Moore, Circuit Judges, affirmed the judgment of the Court below.

POINT I

The holding in the case of *Lauritzen* v. *Larsen*, *supra*, is not controlling on the facts presented here.

It is respectfully suggested to this Honorable Court that not only is the question left open in the *Lauritzen* case, *supra*, one which merits consideration by this Court, but that perhaps in view of changing times and circumstances, the entire decision in said case should be reconsidered.

(a) *Lauritzen* v. *Larsen* *supra*, is not controlling herein in view of facts present in this matter, which were absent in the *Larsen* case and which expressly left unanswered the applicability of American statutes based upon those facts.

The *Larsen* case involved the applicability of the Jones Act in a civil suit by a Danish citizen seaman, with residence in Denmark, who, while temporarily in New York, joined a Danish vessel and was injured in Cuban waters.

The shipowner claimed that Danish law was applicable and that Larsen had received all compensation to which he was entitled.

The Supreme Court then discussed the various factors which would enable it to determine the applicability of the United States Statute; Place of the Wrongful Act, Law of the Flag, Allegiance or Domicile of the Injured, Allegiance of the Defendant Shipowner, Place of Contract, Inaccessibility of Foreign Forum, and Law of the Forum.

After declaring that the weight given to the law of the flag overbears most other connecting events in determining applicable law, that it must prevail unless some heavy counterweight appears, the Court (discussing Allegiance or Domicile of the Injured) stated that a conflict of allegiance to the flag and the legitimate interest of each nation that its nationals and permanent inhabitants be not maimed and disabled from self-support was present. The Court then continued that Larsen's home was in Denmark, his presence in New York was transitory and created no national interest or duty by the United States toward him to justify intervention of the law of the United States aboard a Danish vessel.

Thus—the basic issue of the case at bar—the applicability of American statutory law to a permanent inhabitant of the United States was discussed and expressly left unanswered as outside the issues present in the *Larsen* case.

Discussing the accessibility of the foreign forum, the Supreme Court pointed out that the parties stipulated that a claim could be made through the Danish Consulate in New York, that compensation was an exclusive remedy under Danish law, that Larsen had already received all that he was entitled to under that law. Again, the basic controverted issue present in the case at bar was absent in the *Larsen* case.

It would appear that the rejection by the Supreme Court of the applicability of the Jones Act was not predicated upon the facts present in the instant suit. The two factors which the Court determined to be without the issues of *Larsen* and which it implied might call for applicability of American statutory law were the very issues raised in the District Court by the petitioner herein. As such, it is submitted that *Lauritzen* v. *Larsen, supra*, is not determinative of this suit, that the various decisions of this Court, none of which were overruled by the *Larsen* case, *supra*, are controlling of this matter.

Lauritzen v. *Larsen, supra*, is not instructive as to the law that would be applied in the event a seaman did not receive all the benefits that he would be entitled to under the law of the flag of the ship involved, as *Larsen* did, nor in the absence of various stipulations as to the applicable foreign law, absent in the case at bar.

For these reasons, the holding in *Lauritzen* v. *Larsen, supra*, merits reconsideration, not only on the questions therein left unanswered, but also revaluation of the questions decided.

(b) The decisions of this Court call for the applicability of the Jones Act to the case at bar.

Turning then to the decisions of this Court, *The Paula*, 91 F. 2d 1001 was an affirmance of a dismissal of a libel *in rem* and *in personam* by a German seaman against a Danish shipowner and vessel. *The seaman was never a resident* of

the United States and signed articles in Chile. He was injured in a United States port. In declining jurisdiction and dismissing the suit, the District Court relied upon the affidavit of the Danish Consul General stating that the compensation system of Denmark was an *exclusive* remedy. There was no issue of inaccessibility of a forum nor did the seaman have any national interest in the United States. This Court stated that the injury in an American port, without further connection was not sufficient to have American law applied to the case.

Thus—the instant suit is clearly distinguishable from *The Paula*.

Gambera v. *Bergoty*, 132 F. 2d 414, was a libel based upon the Jones Act, *in rem* and *in personam*, for injuries sustained by an Italian seaman aboard a Greek ship. The seaman had lived in the United States for about 20 years and had taken out his first papers for naturalization. The Court stated that since he had been so domiciled, the voyage began and ended in the United States and the injury took place between Trenton and Philadelphia, the libel *in personam* should lie. The Court explained that naturalization was a troublesome process for seamen because of their long absences from the country and the fact that they must procure two witnesses who can swear that they have known them continuously for five years, and declared that it would look behind the actual citizenship status of the seaman to see whether he was actually a member of an American community earning his living side by side with those on behalf of whom the Act was passed.

In the case at bar, Berendson signed on at Houston, Texas for a voyage to terminate in the United States. He has resided and is domiciled in New York City continuously since 1946 with no other domicile anywhere in the world. The sole difference between *Gambera* case, *supra* and *Berendson* is that the former sustained injury in American waters, which this Court in *The Paula* said was not of import.

In *O'Neill* v. *Cunard White Star*, 160 F. 2d 446, the Court assuming jurisdiction of the suit stated that the Jones Act would not lie under circumstance whereby a British subject who signed on in London for a trip to Canada and back was washed overboard on the high seas. The deceased and his wife, British subjects, were domiciled in the United States with their children, American citizens. The Court stated that since both the seaman and the ship were British, British law would apply.

In *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597, the Court reversed a District Court judgment which had dismissed a suit based upon the general maritime law and the Jones Act brought by a Panamanian citizen against a Panamanian corporation for injuries received on the high seas. Taylor signed the articles in the United States.

The District Court dismissed the claim under the general maritime law on the ground that there was no showing of inaccessibility to the Panamanian courts. The Jones Act count was also dismissed.

The Court affirmed the dismissal of the suit under the general maritime law on the ground that there was no abuse of discretion by the District Court. The Jones Act dismissal was reversed on the rationale that the Act extended to all seamen who signed articles in the United States, citing its decision in *Kyriakos* v. *Goulandris, et al.*, 151 F. 2d 132.

It would appear that the principle which guided this Court prior to the *Larsen, supra*, decision was based upon the thought that shipowners who do business in American ports and sign seamen in those ports to man their vessels have the duty to give them the protection of American law.

Though the Supreme Court in *Larsen, supra*, did not consider the place of sign-on to be of sufficient import, the Court, by expressly declining to answer the issue of applicable law to the factor of "Allegiance or Domicile of the

Injured", appeared to reach for the same answer via different route. The petitioner respectfully suggests that those seamen who have a national interest in the United States, who work and live here, pay taxes and become part of the American economy, whether evidenced by years of domicile or residence in the United States or by continuous signing aboard ships in American ports should and do have the protection of the Jones Act.

The petitioner, residing in New York since 1946, having signed on vessels in American ports since that time, and having signed on the DALHEM in Houston, Texas for a voyage to terminate in the United States, it is submitted that there is sufficient national interest to bring the petitioner within the broad purview of statutory law of the United States.

POINT II

The District Court had jurisdiction of this matter.

The shipowner conceded in its memorandum of law at argument of the motion in the District Court, and it is well settled, that the presence of a party or vessel within the jurisdiction endows the Court with control over the suit when service is obtained on said party or vessel. *Ex parte Newman*, 81 U. S. 152; *The Belgenland*, 114 U. S. 355; *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413; *The Falco*, 20 F. 2d 362.

The question involved herein was whether the District Court should have retained the jurisdiction. It is the petitioner's position that the facts presented to the District Court clearly evidenced the necessity to entertain the suit in order to avoid the foreclosure of remedies available to the injured seaman.

POINT III

The District Court abused its discretion by its failure to retain jurisdiction of this cause under the General Maritime Law, on the self serving, unsupported assertion that Berendson could receive justice at the hands of a non-judicial agency selected by the shipowner and of nationality alien to the seaman.

The discretion of the District Court must be exercised with a due regard to the circumstances. The Court should examine the grounds of its decision before the conclusion is accepted and some reason must be shown for the abdication of the District Court's jurisdiction of the matter.

In *The Falco, supra*, this Court laid down the principles of law concerning the respective positions to be taken by the District Court and the Court of Appeals at motions and appeals of the nature involved herein.

> "Moreover, the discretion of the instance court must be exercised with a due regard to the circumstances, and we are required to examine the grounds of its decision, before we accept its conclusion. Courts are primarily established to decide the disputes of all suitors over whom they have jurisdiction, and some reason must be shown for their abdication." (p. 364)

In *O'Neill v. Cunard, supra*, the Court stated that if the District Court's refusal to entertain jurisdiction of the claim would deprive the claimant of his remedy for all practical purposes, it would be an abuse of discretion for the Court to so decline to hear the suit.

In *The Belgenland, supra*, the Supreme Court in discussing the test to be applied by the Appellate Courts in reviewing the District Court's decision, declared:

> "The plaintiffs (appellants) must show that the judge has exercised his discretion on wrong prin-

ciples, or that he has acted so absolutely differently from the view which the Court of Appeal holds, that they are justified in saying he has exercised it wrongly." (p. 368) (Parenthetical matter ours.)

See also: *Motor Distributors v. Olaf Pedersen's Rederi A/S*, 239 F. 2d 403, citing with approval *The Belgenland* as the prevailing law today.

(a) Our courts have consistently held that it is an abuse of discretion to reject jurisdiction when such failure to retain jurisdiction would tend to result in a miscarriage of justice.

Our Courts have consistently held that they will retain jurisdiction in order to prevent a failure of justice, and if the rights of parties would thereby be best promoted.

The Supreme Court discussed the question of retention of jurisdiction in *The Belgenland, supra*, and laid down the following principles of law:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it." (pp. 365-366)
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> * * *
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> "The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist to show that justice would be better served by declining it." (p. 367)

Thus, the Courts at that time and ever since have been diligent in assuring themselves that refusal to hear and determine a suit will leave the injured seaman with an adequate remedy.

In *Cunard v. Smith*, 255 F. 846, this Court, dismissing on other grounds, affirmed the rule that while an admiralty court of the United States is under no obligation to entertain jurisdiction where all the parties are foreigners, yet it also may entertain jurisdiction of a suit between aliens in civil causes of admiralty and maritime jurisdiction and is inclined to do so when it is necessary to prevent a failure of justice and if the rights of the parties would thereby be best promoted.

Heredia v. Davies, 12 F. 2d 500, cited and quoted with approval the rule of law laid down in the *Smith* case, *supra*.

This Court in *The Falco*, *supra*, again expressed the thought that foreign seamen would not be denied the processes of the Court without the Court first determining that he had adequate remedy elsewhere, that even a Consulate protest would have no effect upon the requirement that justice be promoted.

> "Normally disputes arising out of a seaman's employment are referred to the tribunals of the flag. The Ester (D. C.) 190 F. 216. Nevertheless, courts of admiralty, which are sensitive to a seaman's rights, or at least have always professed to be, will in such cases, before turning him out of court, satisfy themselves that there are no special circumstances which will leave him without adequate remedy. The Becherdass Ambaidass, Fed. Cas. No. 1,203; Wilendson v. Forsoket, Fed. Cas. No. 17,682; The St. Oloff, Fed. Cas. No. 17,357; The Topsy (D. C.) 44 F. 631; The Sirius (D. C.) 47 F. 825; The Ester (D. C.) 190 F. 216. Even the protest of a consul is not conclusive, when justice requires the court to entertain the plea. The Lilian M. Vigus, Fed. Cas. No. 8,346" (pp. 363-364).

In *The Falco, supra,* concerning a Brazilian seaman libelling a Swedish ship for injuries sustained by the alleged unseaworthiness of the vessel, this Court stated that if the seaman had any rights under the law of the sea of such nature that only an American court could have given him a remedy, it would not say that the libel would not lie. Thus —the Court implied that a dismissal of a cause where only an American forum could afford a remedy was an abuse of discretion and reversible error.

See also: *The Fletero* v. *Arias,* 206 F. 2d 267; *O'Neill* v. *Cunard,* 160 F. 2d 446; *Motor* v. *Olaf,* 239 F. 2d 463; *Bernhard* v. *Creene,* 3 Fed. Cas. 279; *Koenigan,* 184 F. 170; *Danielson* v. *Entre,* 22 F. 2d 326; *Canadian Commander,* 43 F. 2d 857; *Barkas* v. *Cia Naviera,* 126 F. Supp. 532; *Cruz* v. *Harkna,* 122 F. Supp. 288, all to the same effect.

(b) The facts presented to the District Court at the motion gave rise to doubt of the fullness or adequacy of the remedy available to the petitioner through the offices of the Swedish Consulate in New York.

The petitioner can not return to Estonia. Nor can he enter Sweden because of lack of a recognized passport. The sole forum open to the petitioner is the United States and the Shipowner conceded this to be so by the absence of any statement in its affidavits that Berendson can or should return to Sweden for relief.

The claim by the Shipowner that the Swedish Consulate affords a complete remedy in New York is without basis in fact. The affidavit of the Consul General stated only that the Consulate had the power to entertain the compensation claim. It was absent of any statement that the Consulate would or could pay an award to Berendson. The affidavit was also absent of any statement that the compensation system to be processed through its offices was an exclusive remedy under the Swedish law but rather averred only that insurance to pay compensation was mandatory upon Swedish shipowners. This was especially noteworthy in view of

the fact that the point was raised in the opposing affidavits and although the Shipowner saw fit to submit a reply affidavit after oral argument of the motion, it still did not assert that there was in fact no other remedy available to Berendson although it was obviously a most crucial issue.

POINT IV

The suggested agency by the shipowner was demonstrated to be a biased, prejudiced and inadequate entity, unconcerned if not actually hostile to petitioner.

The activities and conduct of the Swedish Consulates involved in this matter, the same entity which pleaded the privilege of protection of the petitioner's rights, appears to have lacked the force of conviction necessary to aid Berendson in obtaining any relief.

1. Assuming the master of the DALHEM notified the Swedish Consulate in Cuba of Berendson's injury as he was required to do (paragraph 6 of the Consul General's affidavit), the petitioner, critically injured, was in Cuba for three months, during which time he neither heard from nor was visited by any consulate official until he telephoned the Consulate only two days before he was physically forced to leave Havana under guard to return to the DALHEM. In fact, the coincidence of the Consulate's hearing from Berendson and his forced removal from Havana gives rise to the thought that it was the Consul that caused the petitioner's departure from the Havana hospital, although not fit for duty and in need of further treatment. They knew of his pain, suffering and injuries and were probably responsible for his incarceration in a foreign jail in South Wales when he refused the shipowner's direction that he go to a country other than the United States.

2. The Swedish Consulate in Boston, Mass. knew of the injury since a hearing was held aboard the vessel in Boston Harbor in April, 1953, while Berendson was still hospitalized in Cuba. There has been no showing that the Consulate in Boston took any action on behalf of the petitioner since that time, over five years ago.

3. The Swedish Consulate in New York knew of the injury since 1953 and deliberately and intentionally ignored the petitioner, showed a callous disregard of his rights and did nothing for him and did not even communicate with him, nor suggest that he file a claim or attend any hearing at any time prior to the shipowner's motion to decline jurisdiction. The petitioner has received no award, has not been in communication with any Swedish Consulate, which even gives rise to the question of whether the statute of limitations is now a bar to recovery—even under the compensation process. Petitioner cannot return to his own country because it is behind the "Iron Curtain". His place of remedy is the United States or no place and non existent.

4. Assuming, arguendo, that the Swedish Consulate would do all that it could do, which is just the opposite of what it has done to date, or failed to do, then, in accordance with paragraph 10 of the Consul General's affidavit, payment must still come from Sweden. The question then arises as to whether, as a practical matter, the recommendation of the Consulate is conclusive upon officials in Sweden, also whether Swedish monetary regulations permit or officials are inclined to forward needed American dollars (or currency to be exchanged for dollars) from Sweden to a non-Swedish seaman having no interest in Sweden. That question also raised by the petitioner was never answered.

5. The opposing affidavit of Harvey Goldstein, Esq., stated that an English translation of the Swedish Maritime Code would be submitted to the District Court when re-

ceived, in an effort to determine whether the compensation remedy was indeed exclusive. The decision of the District Court was entered before the translation arrived from Sweden, though it was quite obvious that if that remedy was not exclusive the petitioner would be denied his right of election of remedy by any action of the Consulate.[1]

Without determining any of the foregoing issues and questions raised by the petitioner in opposing the motion, the District Court dismissed the libel.

(c) The District Court was guilty of an abuse of discretion and the Court below was in error when it affirmed the decision of the District Court which had declined its jurisdiction without first assuring itself by any compelling evidence and/or testimony of the rights and remedies of the General Maritime law of Sweden and the true circumstances concerning the availability of all remedies under that law.

In *The Ivaran*, 121 F. 2d 445 the District Court dismissed a case on the authority of *The Paula*, *supra*. The affirmance by the Court of Appeals for the Second Circuit, however, was without prejudice to renewal of the suit in the event that the remedy available to the seaman by presentation of his claim to the Norwegian Consulate in New York should prove to be non-existent. The said Court implied that if, in fact, the Consulate in New York did not have the power or could not procure the relief for the seaman, it would not have affirmed the dismissal of the libel.

Gonzales v. *Dampskslsk*, 108 F. Supp. 908 (S. D. N. Y.) was a libel for personal injuries to a Spanish seaman who had signed articles in Venezuela aboard a Danish vessel. A motion to dismiss the petition and relegate the libelant to an action under the law of Denmark was denied. The Court held that although the respondent contended that

[1] The code was referred to in oral argument on the appeal to the Court below.

the libelant had an adequate remedy under the law of Denmark and indicated in affidavits and a memorandum that the Danish Consulate could process the claim under an exclusive compensation system, a memorandum was no proper showing of the existence of a remedy. The Court stated that it could not conclude that justice would be served by remanding the libelant to rights under Danish law.

In *Radovcic* v. *The Prinz Pavle*, 43 F. Supp. 1013 (S. D. N. Y.) exceptions to the libel on the ground of insufficiency and because the suit was by a Yugoslav seaman against a Yugoslav vessel for injuries sustained on the high seas was overruled. The Court stated that submission by the respondent of an affidavit by the Yugoslav Consul General in New York stating that awards for compensation for injuries sustained by Yugoslav seamen aboard its ships were adjudicated pursuant to Yugoslav law by an arbitration board of the Yugoslav Shipping Commission Committee in New York was clearly insufficient to justify the Court in refusing to entertain jurisdiction of the suit.

Thus, the Court below was in error in affirming the decision of the District Court, which was guilty of an abuse of its discretion in dismissing the libel solely on the basis of an affidavit, not by any recognized authority or expert on Swedish law, especially in view of what amounted to a deliberate refusal to answer the basic question of whether the Swedish compensation remedy was indeed exclusive.

(d) The District Court should have applied the presumption that the law of the flag was the same as the non-statutory law of the forum in absence of evidence to the contrary.

Heredia v. *Davies*, 12 F. 2d 500, was a suit by a Peruvian against a Peruvian ship for injuries sustained while the vessel was docked at New York. The seaman claimed, and the District Court so found, that the vessel was unseaworthy. The respondent asserted that the law of Peru should govern the case. The Court stated that "in the ab-

sence of proof to the contrary, the presumption is that the law of Peru with regard to the right of recovery is the same as the law of this country, the lex fori", citing *The Scotland*, 105 U. S. 24; *Robinson* v. *Detroit*, 73 F. 883; *Minor*, "Conflict of Laws", 532.

In *Bonsalem* v. *Byron*, 50 F. 2d 114, an assault case, the Court of Appeals for the Second Circuit reversed a decree for a French Algerian seaman employed on a British vessel. The assault occurred in Italian territorial waters. The Court held that the rule was to apply the law of the flag, that recovery would not be allowed under unproved foreign law if there would be no recovery under American law. The Court then discussed the basis of liability under *American* law and concluded that there was no liability under that law.

In closing, the Court declared that the presumption that the unproved foreign law was the same as the law of the forum would be permitted if the basis of recovery was sufficiently rudimentary to be the *jus gentium*.

In *The Fletero* v. *Arias*, 206 F. 2d 267, a suit by an Argentinian seaman against an Argentine vessel for injuries incurred in a United States port, the Court declared that the law of the flag would govern, that the general maritime law of Argentina was the same as that of the United States in absence of evidence to the contrary, and applied the principles of the general maritime law of the United States.

In *Robinson* v. *Detroit*, 73 F. 883, a suit between various parties who were on two American ships which collided on the Canadian side of the Detroit River, one of the parties claimed that the Canadian rules of navigation were different from those of the United States in United States waters. The Court held that there was no proof in the record that the United States rules were different from those enforced in Canadian waters and in the absence of such proof, the Court would assume that the rules were the same as the law of the forum.

See also:

The Scotland, 105 U. S. 24;
Jansson v. *Swedish-American*, 185 F. 2d 212;
Cruz v. *Harkins*, 122 F. Supp. 288.

We believe that the interests of justice and uniformity of admiralty law would best be served by adopting the holding in *The Fletero* v. *Arias* case, *supra*, as to the basic facts which should control on the question of whether jurisdiction should be retained or rejected in an action by an alien seaman against a foreign shipowner.

Conclusion

In view of the fact that the Supreme Court of the United States in *Lauritzen* v. *Larsen, supra*, has left an important question open and unanswered, which should be answered at the present time, and in view of the fact that there is a conflict of opinion between the Courts of Appeal for the Second and Fourth Circuits, and in view of the fact that a seriously crippled and injured seaman, having no home but the United States, has been denied access to our American Courts, which is tantamount to a denial of justice which is of grave concern to all alien seamen who are displaced persons and domiciled in the United States, and in view of the fact that the decision in *Lauritzen* v. *Larsen, supra*, needs clarification, it is respectfully urged that these questions merit consideration by this Honorable Court and that the petition for a writ of certiorari should be granted herein.

Respectfully submitted,

SHAFTER & SHAFTER,
Proctors for Petitioner.

JACOB RASSNER,
Of Counsel.

JACOB RASSNER,
On the Brief.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 308—October Term, 1957

(Argued April 7, 1958 Decided July 11, 1958)

Docket No. 24586

ERICH W. BERENDSON,

Libelant-Appellant,

—v.—

REDERIAKTIEBOLAGET VOLO,

Respondent-Appellee.

Before:

SWAN, HINCKS and MOORE,

Circuit Judges.

On appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge*. From a decree dismissing the libel "with prejudice as to further actions in this court," the libelant has appealed. Affirmed.

SHAFTER & SHAFTER, *Proctors for Appellant.* Jacob Rassner and Harvey Goldstein of Counsel. Harvey Goldstein, on the Brief.

HAIGHT, GARDNER, POOR & HAVENS, *Proctors for Appellee.* David P. H. Watson and James M. Estabrook of Counsel.

SWAN, *Circuit Judge*:

This litigation originated in a libel brought by a seaman employed on respondent's vessel to recover under the Jones Act and the general maritime law for alleged injuries sustained by him when he fell through an open hatch. Libelant is an Estonian citizen who signed on at Houston, Texas, for a voyage to terminate in the United States. The respondent is a Swedish corporation, and its vessel sailed under the Swedish flag. The accident happened on March 27, 1953 outside the territorial waters of the United States.

After entering its appearance, the respondent moved the court to decline to retain jurisdiction. The motion was heard upon supporting and opposing affidavits. It was granted in an unreported memorandum decision in which Judge Ryan held the Jones Act not applicable and stated with respect to the claim under the general maritime law:

> "There is no reason for this court's retaining jurisdiction since the extent of the libelant's recovery is determined by Swedish law which can adequately, if not better, be applied by the Swedish consul (*Koziol* v. *Stockholms, supra*), and since there is a convenient forum available to libelant capable of fairly adjudicating his rights."

The decree, entered November 7, 1956, dismissed the libel with prejudice as to further actions in the district court for the southern district of New York.[1]

The appellant makes two contentions: (1) that the district court abused its discretion by failure to retain jurisdiction under the general maritime law; and (2) that the court erred in holding the Jones Act inapplicable. These contentions will be considered in inverse order.

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[1] Timely notice of appeal was filed on December 13, 1956. Why the appeal has taken 15 months to be reached for argument does not appear.

In holding the Jones Act inapplicable Judge Ryan cited as authoritative *Lauritzen* v. *Larsen*, 345 U. S. 571 and *Koziol* v. *The Fylgia*, 2 Cir. 230 F. 2d 651, cert. den. 352 U. S. 827.* We agree that these decisions are conclusive on this issue. Appellant's attempt to distinguish them by reliance on earlier cases in this court which stressed the importance of the place of signing shipping articles is unsound. Although our earlier decisions were not expressly overruled by *Lauritzen*, the opinion in that case makes clear that the Supreme Court considers of relatively little weight the place where the seaman signs on. See *Rankin* v. *Atlantic Maritime Co.* (S. D. N. Y.), 117 F. Supp. 253. Also unsound is the argument that *Lauritzen* is distinguishable because libelant had a "sufficient national interest" to bring him "within the broad purview of the statutory law of the United States" by reason of the fact that between voyages he lived at a seaman's club in New York City. His presence here was never more than transitory; he never entered the United States except as a seaman and could not legally remain ashore more than 29 days between voyages. As said in the *Lauritzen* opinion with respect to Larsen, page 587: "His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another."

The appellant's contention that Judge Ryan abused discretion in failing to retain jurisdiction of the suit is not supportable. His memorandum opinion shows that he rightly inferred that the remedy provided by Swedish law for seamen injured aboard a Swedish ship could be administered by the Swedish Consul in New York. The affidavit of the Swedish Consul General states that "an injured seaman has a full and complete right to compensation from the in-

* This case is cited as *Kozoil* v. *Stockholms* in the opinion of Judge Ryan quoted above.

surance fund * * * " and that "his application therefor may be entertained by any consul or vice consul of Sweden * * * and arrangements there made for the payment of such amount as the seaman may be entitled to under the laws of the Kingdom of Sweden." Thus it is immaterial that Berendson could not, as he asserts, enter Sweden to prosecute a civil action there because he lacks a valid passport from Estonia and cannot obtain one. *The Flatero* v. *Arias*, 4 Cir. 206 F. 2d 267 is plainly distinguishable.[2] We see no basis whatever for holding that the district court abused discretion in declining to retain jurisdiction.

Judgment affirmed.

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[2] See Judge Parker's discussion at page 270.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. THOMAS W. SWAN,
HON. CARROLL C. HINCKS,
HON. LEONARD P. MOORE,
Circuit Judges.

ERICH W. BERENDSON,
Libellant-Appellant,

v.

REDERIAKTIEBOLAGET VOLO,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed, with costs to the appellee.

A. DANIEL FUSARO,
Clerk.